IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION
~~PETITION FOR WRIT OF CERTIORARI TO THE~~
NEW YORK STATE SUPREME COURT
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

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TABLE OF CONTENTS

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Respondent's Memorandum in Opposition

For the purposes of this memorandum, we adopt the preliminary matters in the Petition titled: Opinions Below; Jurisdiction; Questions Presented For Review; Constitutional Provisions and Statutes Involved.

Point One

The state court decision is in conformance with prior decisions of this Court as respects the Constitutional issues; no need for further review is shown.

Petitioner Dunaway was escorted to police headquarters for questioning, where he was given his Miranda warnings. His subsequent statement and the drawing he made were introduced at trial against him. No serious issue as to his Fifth or Sixth Amendment rights is present. The central issue then, is whether the presumed initial violation of his Fourth Amendment rights requires that his statement and the drawings must be suppressed as fruits of the poisonous tree.

This case was previously before this Court, and remanded for further consideration in light of Brown v. Illinois, 422 U.S. 590 (Dunaway v. New York, 422 U.S. 1053, 95 S. Ct. 2674).

In Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, this Court developed the "fruit of the poisonous tree" doctrine and established some guidelines so trial courts could determine when to exclude evidence resulting from an illegal arrest.

In Brown, the only issue relevant to this case was whether the Miranda warnings alone would "... break the causal connection between the illegal arrest and the giving of the statements..." People v. Brown, 56 Ill. 2d 312, at 317, 307 N.E. 2d at 358.

This Court said it would not, and also said:

> The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. Brown v. Illinois, 422 U.S. at 603, 95 S. Ct. at 2261.

In this case, there was little if any coercion. The officers that initially contacted Dunaway did nothing more than transport him to headquarters. There was no talk of arrest, no guns were displayed, and those officers did not talk to Dunaway about the case at all.

When he arrived at headquarters (or shortly thereafter) Dunaway was interviewed by one officer, Detective Novitsky. Granting that talking to a detective in a police station may create its own coercive atmosphere, there is not the slightest evidence that the police sought to exploit the illegal detention. Indeed, they did not appear to think they did anything wrong. We do not suggest that their thoughts provide a defense, but the state court could consider the "... purpose and flagrancy of the official misconduct..." among other things, in determining the admissibility of the evidence. Brown v. Illinois, 422 U.S. at 603, 95 S. Ct. at 2261.

The findings of the state court after remand clearly show there was no coercion, no threats, no pressure and no improper exploitation of the initial illegality (See the trial court's findings in the Petitioner's appendix at A-17 that the Miranda warnings were given and that defendant (Petitioner) voluntarily gave the evidence).

Apparently the only illegality present here was the initial detention, which continued until Detective Novitsky read Dunaway his rights.

Under those circumstances, the court below could correctly find that the Miranda warnings alone would sufficiently attenuate the unlawful detention so as to make the admission the product of a free will.

The flagrant conduct found in Brown is not present in this case. Since we understand Brown to require that the facts offered to weaken the effect of the initial illegality must be measured in terms of the flagrancy involved, the minimal illegality here easily supports the conclusion that, in this case, the Miranda warnings themselves sufficiently attenuated the initial illegality, making the statement and the drawing admissible.

This is true even in face of the instruction in Brown that:

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. (422 U.S. at 402, 95 S. Ct. at 2261)

because the violation here was neither wanton nor purposeful.

The state court holding here is not only consistent with the holding in Brown, but also the holdings in United States v. Calandra, 414 U.S. at 348, 94 S. Ct. at 620: "... the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons..." See also, Michigan v. Tucker,

417 U.S. 433 at 447, 94 S. Ct. at 2365, where the Court discusses the effect of the officer's good faith.

We therefore urge that the state appellate court here has decided the federal question consistent with the applicable decisions of this Court [c.f. Rules of the Supreme Court of the United States, Rule 19 - 1 (a)], and further review is not necessary.

Point Two

A second, purely voluntary, statement by petitioner supports the holding that his earlier statement was the product of his free will.

There are additional facts present in the case which support the Constitutionality of conviction which the state courts did not rely on.

The day after petitioner Dunaway made his initial statement, and provided the drawings to Detective Novitsky, Dunaway asked the jail guard if he could see Novitsky. He initiated this contact wholly on his own.

When they met, Dunaway gave a more complete statement to Novitsky, including the part played by the codefendant in this robbery-murder.

Both statements and the drawings were held admissible at the pre-trial suppression hearing.

At the joint trial, the trial prosecutor elected not to use that second statement because of redaction problems. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 162.

This, we think, lends great weight to the holding that Dunaway's initial statement was freely given and not the result of the initial, illegal detention.

The second statement was voluntary in the purest sense, since he made it without prompting from anyone. It is also not a "cat out of the bag" statement, made only because the police already knew everything.

That theory might be applicable if the police had coaxed the second statement from him, which they did not do.

These additional facts were presented to the court below, but they made their decision without reference to that aspect of our argument, presumably because they felt it unnecessary.

Nevertheless, in considering whether the state court decision was consistent with Constitutional requirements, this Court can consider the entire factual history of the case in determining if petitioner's initial statement was made freely, or was the product of an illegal detention.

Summary and Conclusion

In Points One and Two we have attempted to persuade the Court that further review is not necessary because the decision below is consistent with the recent decisions of this Court on the relevant issues.

However, the state court decision was clearly not decided solely on the grounds we have urged here.

The state court (Appellate Division of the Supreme Court) majority, and the concurring justice decided the case on the theory that the initial detention was not unreasonable, and therefore there was no reason, on Fourth Amendment grounds, to suppress the statement and the drawing.

Their decision was based, almost entirely, on the decision by the state's highest court in People v. Morales, 42 NY2d 129, cert. den., 434 US 1018, 98 S. Ct. 739.

The Morales case had a long history; the New York Court of Appeals had originally affirmed Morales' conviction for murder in 22 NY2d 55; this Court remanded for a further hearing (Morales v. New York, 396 US 102) and after the hearing, and an intermediate appeal, the Court of Appeals affirmed, as noted above.

In their decision, the Court of Appeals held that:

> "...a suspect may be detained upon reasonable suspicion for a reasonable and brief period of time for questioning under carefully controlled conditions protecting his Fifth and Sixth Amendment rights..." 22 NY2d at 64

They reaffirmed that holding when the case came to them the second time (42 NY2d at 137; "...our original view...remains valid today...").

Based on that, the appellate division majority in this case concluded (one justice dissenting) that "...the police conduct here is proper under Morales..." People v. Dunaway, 61 AD2d at 303. The three judge majority also concluded that there was sufficient attenuation to render the questioned evidence admissible, based on Brown v. Illinois, 422 US 590, as we have argued here (61 AD2d at 303).

The concurring justice agreed only with the Morales grounds for admissibility, and specifically disagreed with the Brown theory. 61 AD2d at 304, Denman, J., concurring opinion.

It seems clear that the New York state courts are sensitive to the problems in Brown, and have neither avoided those issues nor ruled contrary to this Court's decisions in that area. See, e.g. People v. Morales, 42 NY2d 129 at 134-36; People v. Martinez, 37 NY2d 662 at 670; People v. Kocik, 63 AD2d 230 (Fourth Dept., 1978, adv. sh. 36); People v. Burley, 60 AD2d 973, 974 (Fourth Dept., 1978, adv. sh. 16).

We urge therefore, that because this case was decided in conformity with this Court's decisions, and because the New York courts have consistently protected defendant's Fourth Amendment rights, there is no need to accept this case for review.

Respectfully submitted,

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